

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 20 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

MICHAEL GEORGE KOGIANES,

Petitioner - Appellant,

v.

MEL THOMAS, Warden,

Respondent - Appellee.

No. 05-15153

D.C. No. CV-99-01261-JWS

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
John W. Sedwick, District Judge, Presiding

Submitted January 9, 2006**
San Francisco, California

Before: NOONAN, TASHIMA, and W. FLETCHER, Circuit Judges.

Michael Kogianes appeals from the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Kogianes alleges that during his trial for

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** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

first degree murder, his trial counsel was ineffective for failing to request an instruction for lesser-included offenses and for relying solely upon an insanity defense. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. We affirm the decision of the district court.

At trial, Kogianes' counsel presented the jury with the options of finding Kogianes guilty of first degree murder or not guilty by reason of insanity. Counsel did not request that the jury be instructed on second degree murder or involuntary manslaughter. On February 9, 1994, the jury convicted Kogianes of two counts of first degree murder.

We review de novo the district court's decision to grant or deny a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. *See Luna v. Cambra*, 306 F.3d 954, 959 (9th Cir. 2002), *as amended* 311 F.3d 928 (9th Cir. 2002). Under the Antiterrorism and Effective Death Penalty Act OF 1996 ("AEDPA"), we may grant habeas relief only if the state court's decision was contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court. 28 U.S.C. § 2254; *Williams v. Taylor*, 529 U.S. 362, 407-09 (2000).

In *Strickland v. Washington*, 466 U.S. 668, 687 (1994), the Supreme Court held that in order to prevail on an ineffective assistance of counsel claim, a

petitioner must show both that (1) counsel's performance fell below an objective standard of reasonableness and (2) that the petitioner suffered prejudice as a result of counsel's performance.

Under *Strickland*'s first prong, we have stated that "[t]here is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance which, under the circumstances, might be considered sound trial strategy." *United States v. Span*, 75 F.3d 1383, 1387 (9th Cir. 1996).

For several reasons, we conclude that Kogianes' counsel employed a legitimate trial strategy in putting an all-or-nothing choice to the jury and that this strategy did not constitute ineffective assistance of counsel. First, the evidence that would have supported a lesser-included instruction was in tension with Kogianes' defense of insanity, and it was not unreasonable for counsel to have chosen to place an emphasis on the evidence supporting insanity rather than second degree murder or manslaughter. See *State v. Murray*, 906 P.2d 542, 567 (Ariz. 1995); *State v. Celya*, 660 P.2d 849, 853 (Ariz. 1985). Second, if counsel had sought a lesser-included instruction, the State would have been allowed under Arizona law to introduce evidence of dangerousness. Finally, even if Kogianes had been convicted of two lesser offenses, he might well have been given an

effective life sentence, or something close to it, given his age at the time of the crime.

Because we conclude that Kogianes has not met the first prong of *Strickland*, we need not inquire into whether the actions of Kogianes' counsel resulted in prejudice.

AFFIRMED.